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No. 90-1312

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMERICAN UNDERWRITERS GROUP, INC.,

Petitioner,

v.

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS
SECOND DISTRICT

PETITIONER'S REPLY BRIEF

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Petitioner American Underwriters Group, Inc., has no parent companies or subsidiaries to be listed pursuant to Rule 29.1.

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Petitioner American Underwriters Group, Inc., ("AUG") respectfully submits this reply to the Brief in Opposition filed by the Respondent ("Commissioner").

The federal question was adequately presented below.

The Commissioner notes that AUG has not provided this Court with a certificate from the Indiana Court of Appeals showing that a federal question was raised below. AUG has demonstrated that its federal question was raised by including pertinent portions of its petition for rehearing and its petition to transfer and the rulings of the Indiana Court of Appeals and Supreme Court thereon in its Appendix. (A-123, 126, 15, 16). No certificate is necessary in this case. See R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 156-157 (6th ed. 1986).

The Commissioner cites cases for the general rule of Indiana appellate law that a question or theory cannot be presented for the first time on a petition for rehearing or on appeal. The general rule has its limitations. The Indiana Supreme Court has said:

> While this court is not bound to consider questions presented, for the first time, on petition for rehearing, even if by an appellee, it may do so to affirm a judgment.

Alsman v. Walters, 184 Ind. 565, 111 N.E. 921, 922 (1916). The Indiana Court of Appeals has also said:

> A party may, on petition for rehearing, adduce additional authorities and arguments in support of the points properly made in the original briefs.

Louisville, E. & St. L. Consolidated R. Co. v. Berry, 9 Ind.App. 63, 36 N.E. 646, 647 (1894). Throughout this case, AUG has argued and briefed the point that IC 27-9 should not be construed to include

an attorney-in-fact such as AUG because AUG was an agent and not an insurer. AUG's constitutional argument serves to support the same point, and that argument is based upon the same evidence introduced before the trial court in this case.

The Commissioner claims that International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), is distinguishable. He first asserts that the Indiana Court of Appeals did not actually consider and decide a federal question while the Alabama Supreme Court in Davis arguably did. That assertion fails to recognize the nature of the pre-emption issue considered by this Court in Davis which was stated to be "in the nature of a challenge to a court's power to adjudicate that may be raised at any time." Id. at 382 (emphasis added).

Referring to the Court's footnote 11 at the end of the discussion of the jurisdictional issue, commentators have interpreted Davis "to say that even if the state proceeding had gone to final judgment, the judgment could be set aside if in fact the claim had been preempted" by observing:

> After characterizing the effect of the labor preemption cases as ruling that federal tribunals have exclusive jurisdiction, the Court concluded that this exclusive jurisdiction preempts conflicting state court jurisdiction. "Consequently, a procedural default in state court does not protect a state-court judgment from preemption."

Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction § 4023 n.23.6 (1990 Supp. at 761, 764). The same commentary has further observed with regard to Davis:

> Invocation of the term "jurisdiction" clearly does not help answer the question addressed by the Court. The strength of its ruling must depend on

> the force of the underlying preemption policies. If indeed a final state judgment would remain subject to attack on the basis of a preemption argument never advanced in the state proceeding, it seems plausible to conclude that state courts are required by federal law to put aside ordinary pleading practices and entertain the argument at any time before final judgment. The extraordinary force thus attributed to labor preemption policies, however, does not have many counterparts in other areas. There must remain a vast number of federal claims and defenses, including preemption, as to which state courts can insist on adherence to their ordinary rules of pleading responsibility.

Id. (1990 Supp. at 762; emphasis added). In its footnote 11 in Davis, this Court expressly recognized bankruptcy as being a counterpart to the extraordinary force attributed to labor pre-emption policies.

The Commissioner next recognizes that Davis held that NLRA pre-emption is not a waivable defense, but he asserts that AUG's argument is waivable. He attempts to rely upon In re Mader's Store for Men,

Inc., 77 Wis.2d 578, 254 N.W.2d 171 (1977), which considered the same question, but his reliance is totally misplaced. He thus quotes from a portion of the opinion in Mader's which addressed the purely procedural question as to whether a receiver can be properly appointed at the instance of a "simple contract creditor" as opposed to a judgment creditor. Mader's correctly concluded that any such error was waived by participation in the receivership without objection. Id. at 254 N.W.2d 182-183. That conclusion, however, followed the discussion and conclusion on the separate question as to whether the statute authorizing the receivership was pre-empted or suspended which Mader's expressly recognized not to be waivable:

> Gelatt clearly has waived his right to assert most objections to the validity of the receivership.

> However, it is fundamental that parties cannot confer subject matter jurisdiction upon a court by waiver or consent. The United States Supreme Court has characterized proceedings under suspended state insolvency legislation as "utterly null and void," Straton v. New, 283 U.S. 318, 327, 51 S.Ct. 465, 75 L.Ed. 1060 (1931), and subject to collateral attack, International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S.Ct. 108, 73 L.Ed. 318 (1929). If Gelatt is correct in asserting that the receivership provisions of ch. 128 are suspended, and if the jurisdiction of the circuit court depended thereon, subject matter jurisdiction would be absent. To that extent Gelatt's claims must be considered notwithstanding his participation in the receivership without complaint.

254 N.W.2d 176 (emphasis added). Mader's supports AUG and not the Commissioner on the jurisdictional issue as well as the merits of AUG's argument as shown below.

The Commissioner finally characterizes AUG's additional argument that the decision below could not have been reasonably anticipated as a "last gasp attempt." The fact of the matter is

that the Court of Appeals ignored pertinent precedents cited by AUG and based its decision on points never argued by the Commissioner. Underwriters' Exchange v. Indianapolis St. Ry., 204 Ind. 676, 185 N.E. 504, 506-507 (1933), specifically held that an attorney-in-fact is not an insurer under Indiana law. The Commissioner has chosen not to address that case in his jurisdictional argument, but he does later mistakenly attempt to distinguish it as will be shown below. Indiana Dept. of Revenue v. American Underwriters, Inc., 429 N.E.2d 306 (Ind. Ct. App. 1981), rehearing denied, 431 N.E.2d 528 (1982), specifically concluded that AUG is separate and distinct from American Interinsurance Exchange ("AIE") for tax purposes and in doing so recognized AUG's role in the insurance operation:

> All assets of [AIE] are subject to the liability of the insurance operation, but none of the assets of [AUG] are available to those claimants.

429 N.E.2d at 311. Surprisingly, the Commissioner himself has chosen not to address that case at all in his Brief in Opposition. The decision below was indeed a surprise, and procedural rules are inapposite in this case for that reason and for all of the other reasons previously given by AUG.

AUG is not an "insurance company."

AUG has previously addressed the cases cited by the Commissioner in his argument that AUG is an "insurance company" excluded from the Bankruptcy Code. The Commissioner here attempts to distinguish Underwriters' Exchange on the ground that the power of attorney in that case did not authorize the attorney-in-fact to maintain an action on

behalf of the subscribers in any matter against a third party while the power of attorney in this case authorizes AUG "to bring, prosecute, defend or otherwise settle suits, actions or proceedings." He thus concludes that AUG could prosecute the action against a tortfeasor who damaged the property of a subscriber under the rationale of Underwriters' Exchange.

The Indiana Supreme Court expressed its rationale to the contrary:

> If appellant could be treated as the insurer, and was compelled to pay the loss occasioned by the party primarily responsible therefor, as asserted in the instant case, there would be a basis for saying that it should be subrogated to the rights of the insured, on the principle that subrogation is a normal incident to indemnity insurance, although the contract of the subscriber has no stipulation to that effect.
>
> But the fact must not be overlooked that reciprocal or interinsurance contracts are distinguishable from all other forms of insurance, in that

> every insured is an inter-insurer and every insurer is insured. Appellant [the attorney-in-fact] is neither an insurer or insured. It has suffered no loss. While it was the medium through which the loss was paid, such payment tended to deplete only the account of the subscribers. Since it has been held that an interinsurance subscriber, for loss sustained, may maintain an action against a cosubscriber for his proportionate liability, notwithstanding such subscriber's contract provided that such actions should be against the attorney in fact, under the circumstances of the present case we are not prepared to say that even a stipulation in the power of attorney authorizing appellant in its own name to sue appellee would be sufficient to meet the provisions of our Code requiring that "every action must be prosecuted in the name of the real party in interest."

185 N.E. at 506-507 (citations omitted and emphasis added). While an attorney-in-fact may be indispensable to reciprocal insurers, it is not an insurer itself under the rationale of Underwriters' Exchange.

The Commissioner further attempts to gain support from dicta quoted from a

general source in Wysong v. Automobile Underwriters, Inc., 204 Ind. 493, 184 N.E. 783 (1933). As previously demonstrated by AUG, Wysong supports AUG and not the Commissioner. Wysong was decided on March 13, 1933, by the same Supreme Court of Indiana which decided Underwriters' Exchange on May 15, 1933, and it is not inconsistent with the rationale of Underwriters' Exchange.

The Bankruptcy Code pre-empts the application of IC 27-9 to AUG.

The Commissioner next argues that even if this Court finds that it has jurisdiction and that AUG is not an "insurance company," IC 27-9 still does not conflict with the Bankruptcy Code because no bankruptcy proceedings were initiated. Contrary to the Commissioner's assertion, AUG has explained why the application of IC 27-9

to AUG conflicts with the Bankruptcy Code in demonstrating that IC 27-9 establishes an exclusive and comprehensive scheme precluding the availability of any alternative "for the purpose of liquidating, rehabilitating, reorganizing or conserving" entities subject to its provisions. As previously indicated, AUG is not contending that the Bankruptcy Code pre-empts the application of other state statutes involving receiverships or assignments for the benefit of creditors which do not conflict with the Bankruptcy Code and which do not preclude the availability of the bankruptcy courts like the application of IC 27-9 to AUG does.

The Commissioner's own authorities support AUG. He thus cites Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933), which upheld a state statute providing

for assignments for the benefit of creditors, and at pages 58-59 of his Brief in Opposition, he quotes the discussion of the rationale of Pobreslo in In re Mader's Store for Men, Inc., supra, including the following:

> An assignment for the benefit of creditors results in the ratable distribution of non-exempt assets of an insolvent debtor among his creditors just as do proceedings in bankruptcy, and the bankruptcy court is available, as an alternative to the assignment proceedings, to the debtor and in most cases to his creditors as well.

254 N.W.2d at 181.

IC 27-9 does not result in a ratable distribution of a debtor's assets like the state statute in Pobreslo did. Rather, IC 27-9-3-40 (A-115) establishes a preferential priority of distribution for the payment of claims which "is anathema to the basic tenet of federal bankruptcy law." In re Family Health

Services, Inc., 104 B.R. 268, 277-278 (Bankr. C.D. Cal. 1989).

Nor is bankruptcy available as an alternative to the proceedings authorized by IC 27-9 like bankruptcy was available to the assignment proceedings authorized by the state statute in Pobreslo. IC 27-9-1-3 (A-45) thus provides that no person except the Commissioner may commence a proceeding "for the purpose of liquidating, rehabilitating, reorganizing, or conserving" the debtor, that no such action may be entertained except in accordance with IC 27-9, and that no such action may be brought except in the Marion Circuit Court.

IC 27-9 clearly conflicts with the Bankruptcy Code and does interfere with the access of a debtor as well as its creditors to the bankruptcy courts. By the Commissioner's own admission at page

60 of his Brief in Opposition, IC 27-9 thus undeniably presents an actual conflict with the Bankruptcy Code if it is applied to AUG.

As AUG has previously demonstrated, it is the conflict of such laws which gives rise to the issue of pre-emption. The issue is not dependent upon the initiation of bankruptcy proceedings. There were in fact no bankruptcy proceedings in International Shoe Co. v. Pinkus, 278 U.S. 261 (1929).

AUG has raised a substantial federal question.

According to the Commissioner, the federal question presented in this case does not merit the review of this Court because of the decision in In re International Underwriters, Inc., 157 F. Supp. 367 (W.D. Mo. 1957). That decision is contrary to Underwriters' Exchange,

Wysong, and Indiana Dept. of Revenue v. American Underwriters, Inc., supra, and as a precedent in this case, it is further contrary to all of the authorities cited by AUG illustrating the proper analysis of the different tests for determining who may be excluded from the Bankruptcy Code and thus subjected to the plenary power of the states under a statute such as IC 27-9.

The Commissioner says that AUG has a certificate of authority which authorizes it "to make contracts of insurance." Like the Indiana Court of Appeals, the Commissioner ignores the fact that the certificate of authority only authorizes AUG to make contracts of insurance "as such Attorney-in-fact, and as far as it may be legally empowered by it's [sic] letter of appointment as such attorney." (A-3). The power of attorney authorizes

AUG only to act "on Subscriber's behalf." (A-4). AUG was thus appointed and acted as an agent for the subscribers of AIE, and the Commissioner fails to acknowledge that fact throughout his Statement of the Case.

The Commissioner has emphasized that AUG is indispensable to AIE because it transacts all business for AIE. The fact that AIE acts only through AUG as its agent is no different from the fact that any corporation acts only through its agents and employees.

AUG was an agent and not an insurer. The logic of the published decision below stands as a precedent threatening to any insurance agent which should be corrected by this Court and thus avoided in the future.

Conclusion

AUG respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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